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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215049
Party	Defendant Hammer Brand LLC dba Wolf Brand Scooters
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ALLIANCE POWER SPORTS, INC.,)	
)	Opposition No. 91215049
Opposer,)	
)	In the matter of :
v.)	
)	U.S. Application Serial No. 86037963
HAMMER BRAND, LLC.)	
)	Filing Date: August 14, 2013
Applicant.)	
)	MARK: WOLF

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Opposer's Response to Applicant's Motion attempts to raise issues of fact. TTAB No. 17, "Opposer's Response". But even if such facts are assumed to be true, as a matter of law, Opposer cannot establish use of Wolf as a trademark before Applicant's filing date. Opposer's response can be summarized as follows:

- Opposer does not dispute that the Wolf mark did not appear on its product or the packaging before Applicant filed its trademark application for Wolf.
- Opposer relies on the appearance of the words "wolf classic 150" on the cover of a product manual to attempt to establish trademark use of the word Wolf.¹
- Opposer points to various online references, brochures and invoices using the word wolf as part of a model name without demonstrating a connection to Opposer as the source.

Opposer does not provide any argument that it used the mark on the product or packaging as required by the Lanham Act or cognizable as common law use, and instead argues that the

¹ Applicant accepts Opposer's story that manuals were provided to customers since it began selling scooters for SYM. Applicant notes there is no publication date anywhere on these manuals and no proof of such use other than Opposer's word. These and other issues of fact are assumed true for purposes of summary judgment. Applicant reserves the right to dispute these issues if summary judgment is not granted.

appearance of the words Wolf Classic on the cover of a product manual fits within an exception created in the Board's *Ultraflight* opinion. This argument fails because it ignores the fact specific nature of that narrow exception as illustrated in subsequent Board decisions.

Further, the appearance of the word WOLF on invoices, internal documents, brochures, and its website occurred after Applicant's filing date, and thus, are incapable of demonstrating priority. Finally, third party websites are not cognizable as use as a trademark under the law cited by Opposer or are irrelevant as subsequent to Applicant filed its trademark application. Ultimately, even if the facts asserted by Opposer in its reply are assumed true, it is clear that Opposer, as a matter of law, has not established trademark use before Applicant filed its application. As such, Applicant requests grant of its Motion for Summary Judgment (TTAB No. 13, "Applicant's Motion"), and dismissal of the subject Opposition.

I. SUMMARY JUDGMENT APPROPRIATE

(A) Standard for Summary Judgment Satisfied

Summary judgment is proper as no genuine issue of material fact is disputed before the board, and the moving party is entitled to summary judgment as a matter of law." *See, e.g., Fed. R. Civ. P. 56 and Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). As set forth in Applicant's Motion and the discussion *infra*, Opposer's only alleged "uses," as a matter of law, do not constitute a *bona fide* prior use in commerce required to secure rights in its sought mark.

(B) Undisputed Facts on Summary Judgment

Concerning the facts under consideration for purposes of summary judgment, Opposer's Response confirms that:

- 1) no WOLF mark appeared on Opposer's product or packaging before Applicant's priority (Applicant's Motion, pp. 13-14);

- 2) Opposer's website does not permit consumers to directly purchase Opposer's goods through online or telephone ordering (Applicant's Motion, pp. 15-16);
- 3) third party websites do not associate the product(s) in question with Opposer (Applicant's Motion, pp. 18-20, *and infra*).

II. OPPOSER SHOWS NO PRIOR USE IN COMMERCE SATISFYING § 1127

Tacitly acknowledging the facts above as undisputed, Opposer argues that it has used the word Wolf on 1) SYM product manuals; 2) brochures; 3) internet web pages; and 4) invoices and order forms. However, none of these appearances constitute trademark use. The cases pointed to by Opposer do not support its position and are limited to their particular facts. Indeed, upon careful reading, these cases are fatal to Opposer's argument that the uses noted above amount to use in commerce.

In particular, Opposer has failed to demonstrate use of "such a nature and extent as to create an association of said [mark] with a single source... sufficient to create a proprietary right in the user deserving of protection." *Era Corp. v. Electronic Realty Associates, Inc.*, 221 USPQ 734 (TTAB 1981). Opposer has not shown that appearances of the word "wolf" owing to Opposer are "calculated to attract the attention of potential customers or customers in the applicable field of trade." *Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305 (TTAB 1979). On the contrary, they have at best shown inconsistent colloquialisms that do not establish use of WOLF for Opposer Alliance Motorsports. Further, the authorities cited purporting to ascribe use in commerce to Opposer's activities are misapplied, and foreclose as a matter of law on any finding of use in commerce.

(A) Manuals Do Not Establish Prior Use in Commerce

As noted in Applicant's Motion, manuals provided with a vehicle at purchase are not a use in commerce because they do not serve trademark's purpose to distinguish products or

identify their source. *See, e.g., Blue Bell, Inc. v. Farah Manufacturing Company, Inc.*, 508 F.2d 1260; 185 U.S.P.Q. 1, 10 (CA 5, 1975). It is generally accepted that package inserts or instructions “do not constitute acceptable specimens of use.” (Any material whose function is merely to tell the prospective purchaser about the goods...is unacceptable to support trademark use. TMEP 904.04 *and, In re Bright of America, Inc.*, 205 USPQ 63, 71 (TTAB 1979)). Opposer cites *In re Ultraflight, Inc.*, 221 USPQ 903 (TTAB 1984) to argue otherwise.

Ultraflight, however, defines an exception to the requirement that the mark be placed on the goods, their containers, tags or labels affixed thereto, or displays associated with sale. 35 USC § 1127. In *Ultraflight*, the manual’s necessity to assembling the product and the presence of other evidence of use was critical to the Board’s decision. This is not the case presently before the Board, and Opposer cannot faithfully apply *Ultraflight* to its position.

In *Ultraflight*, the gliders at issue were sold as an unassembled kit. One alleged use of the trademark was on instructions needed to assemble the glider. That the instructions were needed to assemble the kit, in effect, made the manual **part of the product itself** or an **integral part of the goods**. *Ultraflight*, 221 USPQ at 904 and 906. In *Ultraflight*, the manual was vital to final completion of the product sought by the customer. In addition, the Board relied on the use of the manuals at trade shows to induce purchase of the kit. *Id.* Subsequent decisions by the Board emphasize the narrow exception created by *Ultraflight* distinguishing instances where the manuals were not needed by the purchaser to assemble the finished product², or instances where the manual was not used as part of a display inducing the consumer to purchase the product.³

Here, unlike *Ultraflight*, Opposer does not argue and indeed the manual itself does not support a theory that the manual is required to assemble the product. Opposer’s manual simply

² *In re Drilco Industrial, Inc.*, 15 USPQ2d 1671 (TTAB 1990); *and, In re Star Bridge Sys.*, 2001 TTAB LEXIS 833 (TTAB 2001) (not precedential).

³ *In re Auto Value Assocs.*, 2000 TTAB LEXIS 587 (TTAB 2000) (not precedential).

tells the purchaser about the product. Under TMEP 904.04(b), this is not trademark use. Because Opposer's product is assembled before purchase (eliminating the need for assembly instructions) and there is no evidence of SYM's manual being displayed alongside goods at trade shows, the instant circumstances extend beyond the applicability of *Ultraflight*.

The present facts fall more neatly within the Board's opinions distinguishing *Ultraflight*. *Drilco* affirmed the Office's position that associated papers are unacceptable evidence of trademark use unless they "rise to the level of the assembly instructional manual in the *Ultraflight* case, a manual which was part of a kit which also contained glider parts, and which the Board described as being as much a part of the goods as the various parts **used to build the gliders.**" *Drilco*, 15 USPQ2d at 1672 [emphasis added]. Put another way, "[t]he critical distinction is if the instructional manual such as the manual for the *Ultraflight* powered hang-glider is **considered the goods themselves.**" *In re Accura Bullets, LLC*, 2009 TTAB LEXIS 706 (not precedential)⁴ [emphasis added]. Other decisions echo this distinction and emphasize the paper thin exception created by *Ultraflight*.⁵

Auto Value also set forth the importance of when and how the purchaser encounters literature if the literature is asserted to establish use in commerce:

He states that the brochures are shipped with the goods by the manufacturer to the distributor and then reshipped by the distributor to the auto parts retailers. However, by the time the distributor sees the brochure shipped with the goods, it presumably has already purchased the goods. Likewise, the retailer will already have purchased the goods from the distributor by the time it sees the brochure. [...] Further, there is no evidence that the brochures

⁴ USPTO Official Gazette Notices of 23 January 2007: "A decision designated as not precedential is not binding upon the TTAB but may be cited for whatever persuasive value it might have."

⁵ *In re Auto Value Assocs.*, (distinguishing *Ultraflight* –applicant's brochure is not a component of the goods, nor is it needed in order to assemble, install or operate the goods) and *In re Star Bridge Sys.*, (distinguishing *Ultraflight*, stating, "the manual was **integral to transforming the kit** into a powered hang-glider" which could not be said of Star Bridge Systems' manual)(emphasis added).

are displayed by the retailers to the ultimate consumers in such a manner as to induce the consummation of a sale. *Auto Value*.

Here, even assuming Opposer's version of the facts to be true, the scooter is not sold as a kit and the manual provided is not used by the end purchaser to assemble the product. In addition, Opposer has not alleged or offered any proof that it uses the manual as part of a display inducing the product's purchase. As in *Auto Value*, Opposer's customers will have already completed their purchase before receiving the SYM manual, and there is no evidence that the manuals were ever employed at the point of sale. Consequently, *Ultraflight*, does not apply.

(B) Brochures Do Not Establish Prior Use in Commerce

While Opposer argues that its brochures establish its superior use in commerce, this argument is fatally flawed because the brochures relied on were created **after Applicant's filing date**. Opposer's Response, (pp. 14-15) relies on Ex. 22, a product brochure **from March 2014**. *See*, Ex. BP.⁶ Since the March 2014 brochure was published well after Applicant's 2013 filing date, as a matter of law, it cannot be relied on to establish earlier rights in Wolf.

Even if earlier sales brochures existed, they would not salvage Opposer's position:

Folders, brochures, or other materials that describe goods and their characteristics or serve as advertising literature are not per se "displays." In order to rely on such materials as specimens, an applicant must submit evidence of point-of-sale presentation. Such evidence must consist of more than an applicant's statement that copies of the material were distributed at sales presentations or tradeshows. **A mere statement that advertising and promotional materials are used in connection with sales presentations is not sufficient, in and of itself, to transform advertising and promotional materials into displays used in association with the goods.**

TMEP 904.03(g) [internal citations omitted]. Opposer quotes this authority, but does not submit evidence of point-of-sale presentation. Opposer's efforts at best fall under the unacceptable

⁶ Opposer's website states the campaign including Exhibit 22 began on or around March 2014. This timeframe accords with similar findings in discovery reflected in Applicant's Motion.

“mere statement” category. Without evidence of point-of-sale presentation for a brochure in commerce before Applicant’s adoption of its WOLF mark, the brochures cannot be relied upon to establish prior use.

(C) Web Pages Do Not Establish Prior Use in Commerce

Opposer points to uses of the word Wolf on its website, third party websites, and in web forums to support its use. Opposer and these third parties refer to the SYM product as the 150, the Classic 150, the SYM Classic 150, the SYMWolf Classic 150, the Wolf Classic, the Wolf Classic 150, and other permutations such that the consuming public is presented with an inconsistent marketing message that prevents any association of these various monikers with Opposer as their source. Moreover, Applicant objects to and moves to strike this material as its introduction fails to meet the requirements of TBMP 528.05(e) and 704.08(b).⁷

1. Opposer’s Websites Are neither Prior nor Use

Opposer further states that the presence of “wolf” on web pages creates a genuine issue of material fact. Opposer’s Response, pp. 11 and 12. But the proffered websites do not predate Applicant’s filing. Opposer’s Response cites to an ad campaign commenced in March 2014. Further, the photos from the associated product gallery reflect a mark configuration which Opposer only ordered in “late October 2013.” Applicant’s Motion p. 13. Thus, Opposer’s own web content does not establish **prior** use.

Separately, Opposer’s conclusion that the websites are displays is incorrect. Opposer’s Response, p. 15. Websites can constitute displays associated with the goods only if the website includes means for ordering the identified goods. *In re Sones*, 590 F.3d 1282, 1288, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009). Opposer’s website does not include any means for ordering.

⁷ The cited internet materials do not provide a publication date, and are not from an acceptable URL. TBMP 704.08(b). Consequently, they are not self-authenticating under TBMP 528.05(e).

Applicant's Motion, p. 15. Thus, considering the content and date, as a matter of law, Opposer's website does not establish prior use in commerce.

2. Third Party Websites Do Not Establish Prior Use for Opposer

Opposer offers Exs. 25 and 26, to show use of WOLF on **third party** websites, noting that at least three online sellers offer the SYM CLASSIC 150 for purchase. Even assuming the cited content existed before Applicant's filing date, the websites do not attribute their use of WOLF to Opposer. 35 U.S.C. § 1127 (restricting trademark owner to actual or intended user).

Opposer's invoices furnished are for different dealers than the websites identified.

Further, Ex. 26, the website for Second City Scooters, actually distinguishes Lance products⁸ from the SYM

Wolf Classic and other SYM products. Exs. BR and

BS. This distinction tells consumers that the SYM

Wolf Classic 150 is **not** Opposer's product. Ex. 25, showing the website of Scooter Dynasty, likewise does not appear to in any way relate the Classic 150 to Opposer in any way, shape or form. As a result, the appearance of SYM Wolf Classic 150 on these websites is not use in commerce by Opposer.



In addition, it is unclear, *arguendo*, whether these online sellers in fact satisfy the requirement that the site include means for ordering the goods.⁹ Opposer also shows undated Craigslist ads for Opposer's products. Ex. 27. As with virtually all of Opposer's exhibits, these

⁸ Opposer proffered the Lance Facebook page as its own, and therefore, it has been assumed that Lance is owned by Alliance. Applicant's Motion, p. 17. Applicant reserves the right to challenge this outside of the instant motion.

⁹ One of the three, Town and Country Cycles, does not appear to sell this model. Ex. BQ. The other two sites specifically note that, while online **payment** is accepted, local pickup is necessary to complete the sale. See www.iheartscooters.com/scooters/sym-Wolf-Classic-150.php ("How it works..." link under "Buy Online"); and www.scooterdynasty.com/150ccsymwolfclassic.aspx ("Local Pick-Up Only").

do not show Opposer's alleged mark and do not include any date. The Craigslist at best amounts to unverified postings.¹⁰

The sites relied upon do not show any appearance of a WOLF mark owing to Opposer. Consequently, the proffered websites do not establish prior use in commerce as a matter of law.

(D) Invoices and Order Sheets Do Not Establish Prior Use in Commerce

Opposer states that "[t]he 'WOLF' mark appears on Opposer's order sheet and on the invoices." Opposer's Response, p. 6. The TMEP states:

Materials such as invoices, announcements, order forms, bills of lading, leaflets, brochures, printed advertising material, circulars, publicity releases, and the like, are not acceptable specimens to show use on goods. See *In re Bright of America, Inc.*

TMEP 904.07. Opposer's reliance on such invoices and order sheets, therefore, is misplaced. The fact that such invoices are internal documents and were marked **commercially sensitive** under the Protective Order (TTAB Doc. No. 6) further belies any notion that they demonstrate use of the mark in commerce.

III. LIKELIHOOD OF CONFUSION EXCEEDS THE SCOPE OF THE PRESENT MOTION

Likelihood of confusion is irrelevant to the motion before the Board. As identified in *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1981 CCPA LEXIS 264, 209 U.S.P.Q. (BNA) 40 (C.C.P.A. 1981), cited by Opposer, the question of whether confusion is likely only applies when Opposer has a legally recognized right in the mark:

Under section 2(d), as utilized in an opposition, **confusion, or a likelihood thereof, is not recognized where one claiming to be aggrieved by that confusion does not have a right superior to his opponent's**, or where he has not proved that that which he claims identifies him as the source of goods or services actually does so.

¹⁰ <http://www.google.com/webhp?q=craigslist+scams>

Otto Roth, 640 F.2d at 1322 [emphasis added]. As set forth above and in Applicant's Motion Opposer established no such superior right. Further, because Applicant's Motion did not raise the issue of likelihood of confusion, and Opposer did not file a cross-motion for summary judgment, the question of whether a likelihood of confusion exists is not before the Board. Consequently, Opposer's references to fame and advertising expenditures are irrelevant and a clear attempt to divert attention from their failure to secure rights in the WOLF mark prior to Applicant.

IV. CONCLUSION

The question of whether Opposer has a right to bring this Opposition is a legal inquiry which may be properly decided as a matter of law. Here, even accepting Opposer's contentions as true, Opposer has not, as a matter of law, established a *bona fide* use in commerce of wolf as a trademark before Applicant filed its trademark application. Applicant, therefore, asks the Board to find summary judgment in Applicant's favor, and conclude the present proceeding.

Dated: February 5, 2015

Respectfully submitted,

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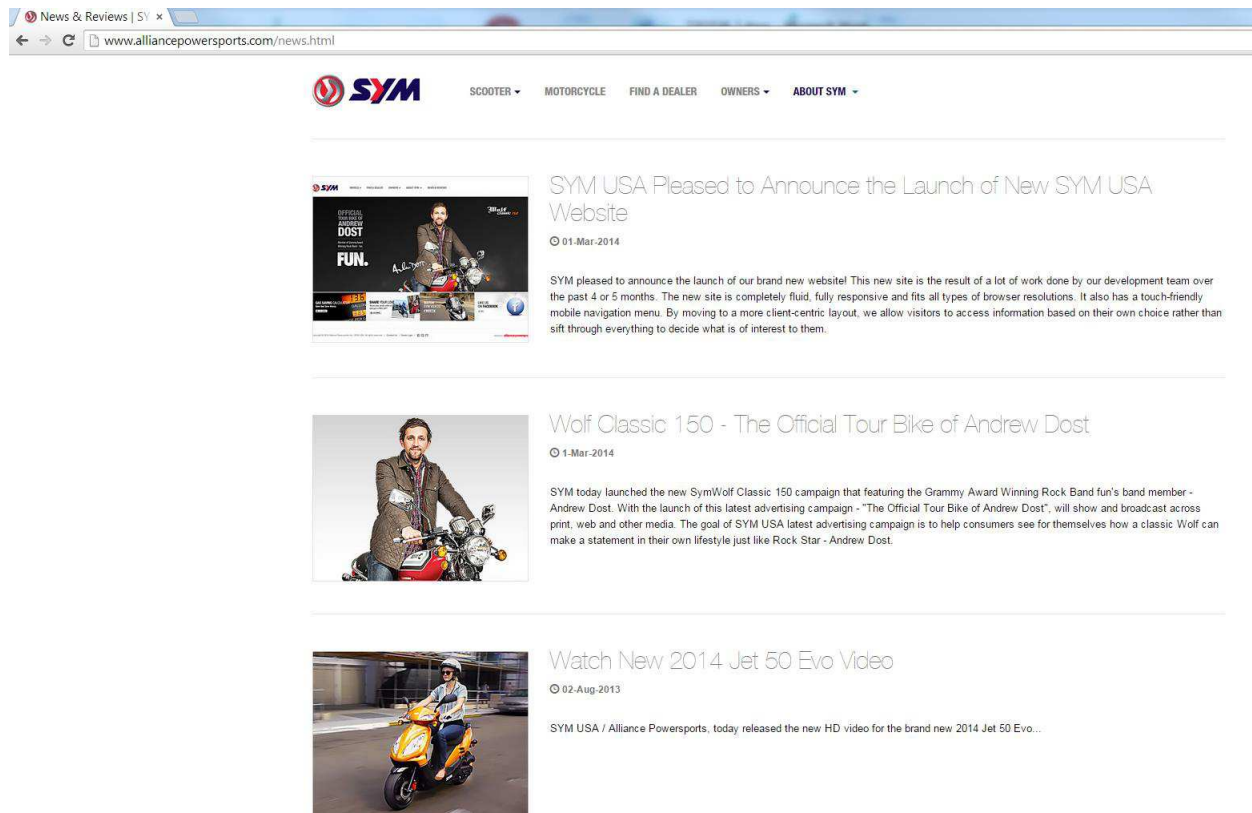
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was served upon counsel for Opposer on this 5th day of February, 2015 by first class mail and e-mail to:

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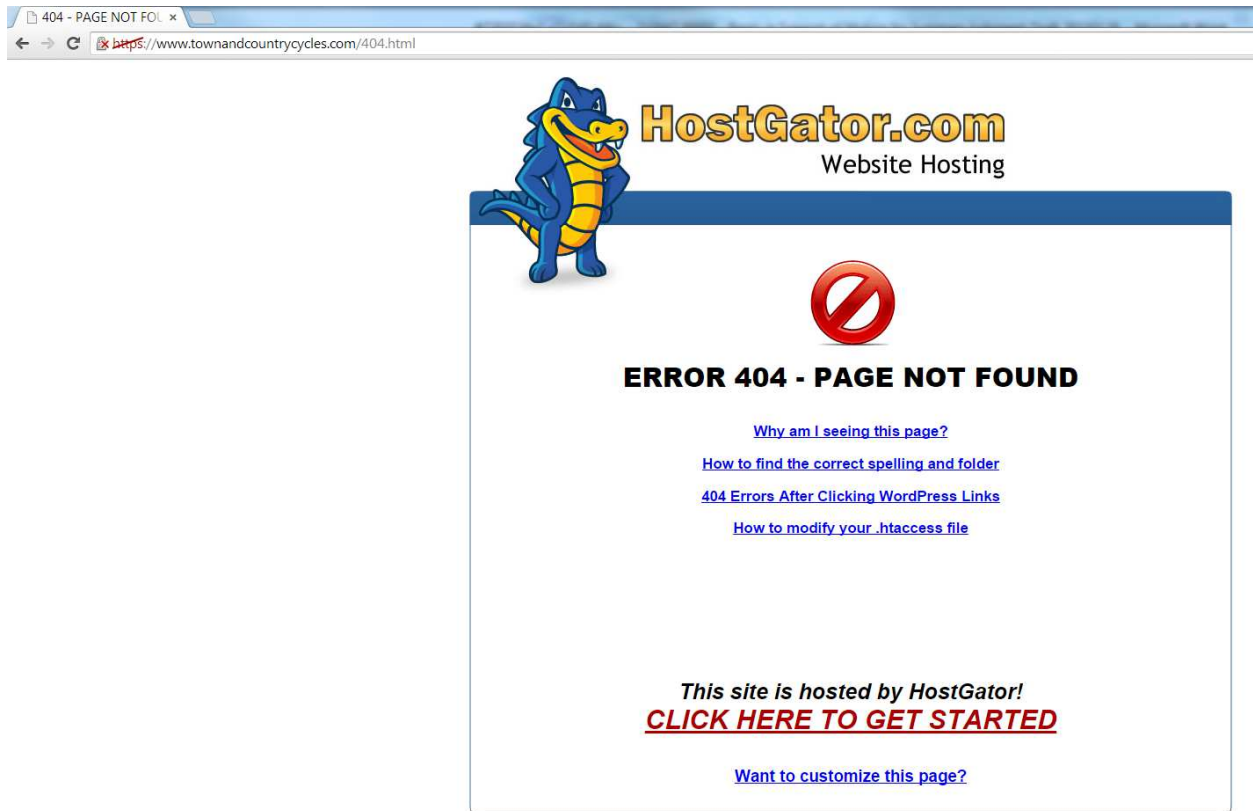
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EXHIBIT BP



March 1, 2014: “SYM **today** launched the new SymWolf Classic 150 campaign...”


EXHIBIT BQ



Attempting to complete SYM CLASSIC 150 sale at third party retailer.

EXHIBIT BR


Second City Scooters x
 iheartscoters.com/scooters/



SYM Fiddle II 125 **\$2,499**

The Fiddle II is an air-cooled 125 rated at 8.5 hp, perfect for Chicago. Braking and handling on the Fiddle II are really nice. The Fiddle II soaks up small bumps without disturbing the rider and provides good feedback at 'brisk' riding speeds


90⁺ MPG
[View details](#)



SYM Symba 100 **\$2,599**

The Symba is powered by a 101cc four-stroke engine with forced air cooling. There is a four-speed transmission with an automatically actuating clutch. The spoked 17 inch wheels carry inner-tube style 2.50-17-38L tires. Drum brakes are utilized front and rear. The front suspension is a telescoping fork. The Symba has a seat height of 30 inches and weighs 209 pounds.


100⁺ MPG
[View details](#)



SYM Wolf Classic 150 **\$3,199**

The Wolf Classic with its iconic retro styling is reminiscent of the legendary Triumph Tiger from yesteryear with vintage style instrumentation, chrome plated front mudguard, chrome plated peashooter exhaust and classic tank & paint design typical of the era.


85⁺ MPG
[View details](#)



SYM HD200 EVO **\$3,699**

Although the HD is a fine work of design, the features which make this scooter superior are invisible: 4-valve technology, water cooling, Overhead cams, a 60W halogen headlight and an electrical charging system that made the old kick start entirely obsolete.

70⁺ MPG
[View details](#)



SYM RV200 EVO **\$3,899**


This RV200 EVO is a light-weight cruiser and comes with elegant styling and a strong, powerful heart.

70⁺ MPG


SYM products on Second City Scooters, as distinguished from Lance (Alliance/Opposer) products.

EXHIBIT BS

Second City Scooters x
 iheartscoters.com/scooters/




Lance Cali Classic 125 **\$2,199**



The Lance Cali Classic 125 - our best selling scooter. Extremely easy to ride, the design is characterized by smooth lines, naked handlebars, comfortable seat, high quality paint work, and elegant chrome. 125cc air-cooled 4-stroke engine with SYM proprietary ceramic-coated cylinder technology. Top speed of 59 miles per hour, with an estimated fuel economy of 90 miles per gallon, and a fuel capacity of 1.18 gallons, the Cali Classic has extremely low fuel consumption and is environmentally conscience.


90⁺ MPG
[View details](#)



Lance Havana Classic 125 **\$2,199**

The Lance Havana Classic 125 is the perfect inner-city commuter scooter. 125cc air cooled 4-stroke with SYM proprietary ceramic-coated cylinder technology. Acceleration is smooth and continuous. Powerful brakes let you stop in every situation. Handling is solid and agile. The Havana Classic is comfortable and upright and low to the ground.


90⁺ MPG
[View details](#)



Lance PCH 150 **\$2,399**

The brand new 2014 Lance PCH 150 is a sporty style scooter, built by SYM, with the same time test engine and build quality as the Cali Classic and Havana Classic 150. It's the perfect scooter for someone looking to get into the world of biking without having a typical scooter.

87⁺ MPG
[View details](#)



Lance Cabo 150 **\$2,499**

The new Lance cabo 150 is a motocross style Scooter, built by SYM, which takes the sporty design of the Lance PCH to another level with its aggressive and quality finishes. It's the Urban-Assault-Scooter, as we like to call it!

87⁺ MPG
[View details](#)

Lance (Alliance/Opposer) products on Second City Scooters, which exclude the Classic 150.